

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 September 2013

Public Authority: Her Majesty's Revenue & Customs (HMRC)

Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested legal advice taken and received by HMRC in relation to the Categorisation of Earners Regulation 1978 ("the Regulations"). HMRC withheld this information as it considered it to be subject to legal professional privilege (section 42 of the FOIA).
2. The Commissioner's decision is that HMRC has correctly applied the section 42 exemption to the requested information and the balance of the public interest lies in withholding the information.

Request and response

3. On 12 December 2012, the complainant wrote to HMRC and requested information in the following terms:

"1. Copies of legal advice taken/received by HMRC in relation to the Categorisation of Earning Regulation 1978 in relations to its application in regards to Teacher, Trainer, Instructors or type of course etc since 2000-2012

2. Dates of all legal advice on the Categorisation of Earning Regulation 1978 was taken and received that related to teachers, trainers etc or type of course etc."
4. HMRC responded on 14 January 2013 and confirmed it did hold information within the scope of the request but considered it exempt on the basis of section 42(1) of the FOIA – legal professional privilege.

HMRC stated it had considered the public interest but concluded that the balance of the public interest favoured maintaining the exemption.

5. The complainant requested an internal review on 16 January 2013 and following an internal review HMRC wrote to the complainant on 12 February 2013. It stated that it had reassessed the public interest arguments in this case and had concluded that the correct decision had been reached when stating that the public interest favoured maintaining the exemption.

Scope of the case

6. The complainant contacted the Commissioner on 15 December 2012 to complain about the way his request for information had been handled. In particular the complainant did not agree that the public interest favoured maintaining the exemption.
7. The Commissioner considers the scope of his investigation to be to determine if HMRC correctly applied the section 42 exemption to the requested information and if so where the balance of the public interest lies.

Background

8. The Regulations made provision for treating lecturers, teachers, instructors or those in a similar capacity in traditional educational establishments, such as schools, colleges or universities etc., who were not employed under a contract of service (or an employment contract) as employees for National Insurance purposes.
9. With effect from 6 April 2012 the relevant provisions of the Regulations were revoked so that they no longer apply to lecturers, teachers, instructors or those in a similar capacity.

Reasons for decision

10. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege. HMRC has applied the exemption to all of the information it identified as being within the scope of the request.
11. There are two types of legal professional privilege: litigation privilege and advice privilege. Litigation privilege applies to confidential

communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege applies where no litigation is in progress or contemplated. In these cases, communications must be confidential, made between a client and legal adviser acting in a professional capacity, and for the sole or dominant purpose of obtaining legal advice.

12. The category of privilege HMRC is relying on to withhold the information in the scope of the request is advice privilege.
13. The Commissioner has reviewed the withheld information in this case and it consists of emails between HMRC's Solicitors Office and HMRC's policy team about the interpretation of the Regulations. As well as the emails the other information identified by HMRC as being within the scope of the request consists of a number of attachments to the emails, such as draft documents, some of which contain track changes and comments from the solicitors.
14. The Commissioner is therefore satisfied that the information is subject to legal advice privilege. This is because it consists of legal opinions and advice provided to HMRC's policy team by professional legal advisers (from HMRC's Solicitors Office) on the issue of the Regulations. Both the emails and attachments identified by HMRC as being within the scope of the request contain information provided by a professional legal adviser to their client for the dominant purpose of obtaining legal advice.
15. Information will only be privileged so long as it is held confidentially and not disclosed. As far as the Commissioner can see, the legal advice remained confidential at the time of the request and there is therefore no suggestion that privilege had been lost. The Commissioner accepts that the withheld information is legally privileged and the exemption is engaged. He has therefore gone on to consider the public interest test.

Public interest arguments in favour of disclosure

16. There is an inherent public interest in disclosure of information which would promote accountability and transparency by public authorities for decisions taken by them. In this case, the legal advice relates to the interpretation of the Regulations and the advice was sought and provided in order for HMRC to determine whether changes were necessary.
17. The complainant has argued that there is a media interest in the issues of tax and tax avoidance and the requested information therefore carries a strong public interest. In addition to this the complainant has stated that HMRC has misled certain groups of professionals (such as first-aiders) by making them account for National Insurance when they are

not required to. The complainant believes HMRC ignored legal advice and made decisions within its policy team about how to interpret the intention behind the CER to the detriment of many individuals. Therefore the complainant considers there is a public interest in disclosure of the legal advice.

18. The section of the Regulations relating to teachers, trainers and instructors has now been revoked so arguably any legal advice relating to the decision as to whether to revoke this is no longer as sensitive and disclosure would be in the public interest in order to reassure the public and taxpayers that HMRC acted appropriately and interpreted the Regulations correctly and based on sound advice.

Public interest arguments in favour of maintaining the exemption

19. Inherent in the concept of legal professional privilege is the strong public interest in allowing clients to seek full and frank advice from their legal advisers in confidence. The Commissioner recognises the importance in client's being able to obtain candid and full advice and to be able to be open about disclosing this in the course of its dealings with regulators.
20. The Commissioner accepts that disclosure of legal advice would potentially undermine a client's position in the future and may impact on its ability to seek full and frank advice in the first place. This would lead to a more guarded approach to seeking advice and the provision of the advice itself, lessening its effectiveness and the client's ability to make fully informed and robust legal decisions.
21. HMRC has argued that disclosure of the legal advice about the interpretation of the Regulations would have a detrimental effect on its ability to defend itself in any legal proceedings. Although HMRC has not expanded on this argument any further, the Commissioner does recognise there is a potential to prejudice a public authorities position to defend its legal interest by exposing its legal position to challenge. This could result in loss or wasted resources in defending legal challenges.
22. HMRC considers that it carried out a detailed analysis of the impact and evidence-base before revoking the Regulations. In doing so it carried out two public consultations – one in October 2009¹ and one in October

1

http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_029879

2011². In the later consultation HMRC considered any potential detrimental effect revoking the Regulations would have on the benefit entitlement of those affected and its impact assessment concluded that only a small number of people would be affected and there was a high percentage of support for revoke from the group affected.

Balance of the public interest arguments

23. In considering the balance of the public interest, the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege in order to protect the confidentiality of communications between lawyers and their clients. However, he does not accept that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure.
24. In order to determine where the public interest lies in this case, the Commissioner has considered the circumstances of this particular case and the content of the withheld information. He has also considered whether the advice is likely to affect a significant number of people, the timing of the request and the status of the advice.
25. The Commissioner considers that there is a strong public interest in promoting openness, transparency and accountability in a public authority's decision making processes. In this particular case, disclosure of the legal advice would provide a greater degree of transparency in relation to HMRC's decision to revoke the provisions of the Regulations so they no longer apply to lecturers, teachers, instructors or those in a similar capacity.
26. The Commissioner notes that, at the time of the request all decisions had been taken and the Regulations had been revoked. For this reason the complainant argued the legal advice was not still live and had served its purpose. The Commissioner asked HMRC for further detail on this point to establish whether the legal advice was still likely to be relied upon by HMRC.
27. HMRC explained that refunds resulting from recategorisation of workers can only be made in respect of the current tax year and the preceding year in accordance with section 19A of the Social Security Contributions

2

http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_031648

and Benefits Act 1992. For this reason the complainant argued that the legal advice would no longer be live as the two year period for refunds had expired. However, HMRC has further explained that regulation 59 of the Social Security (Contributions) 2001 prescribes circumstances in which the two year rule can be extended so that years subsequent to the current year are not precluded from a refund. For this regulation to apply there must be a trigger such as a challenge from an applicant.

28. The complainant believed that as no compliance cases were taken up in 2010 that the two year rule applied and the legal advice would no longer be live. In this case HMRC can receive refund applications at any time from training providers who voluntarily applied the regulations or who were the subject of a compliance intervention and challenged HMRC's view. After further questioning by the Commissioner HMRC confirmed that it had received an application very recently and this demonstrated that whilst the two year window has effectively closed from the large majority of training providers to apply for a refund, some training providers still retain the legal right to make an out of time refund application to HMRC and this is more than just a possibility as out of time refunds have been received.
29. As such, the Commissioner accepts that the legal advice is still live and cannot be considered to have served its purpose. The Commissioner is of the view that this adds weight to the arguments in favour of withholding the information. This is because the advice may be relied on in the consideration of any future out of time refund applications and may influence the outcome of any such applications.
30. The Commissioner is aware that there was some confusion over the interpretation and application of the Regulations. HMRC acknowledged this in its consultation documents and made it clear that the purpose was to *"seek views on how the Regulations should be amended in order to clarify those to whom it is intended they apply."* Following the first consultation and after reviewing the response, HMRC published a second consultation document with the intention of gathering views on the proposed revoking of the Regulations in relation to teachers, lecturers and instructors.
31. In making the decision to consult on the proposed revoke, HMRC acknowledged that:

"Views have been expressed by some vocational trainers that the problem with the Regulations is not the Regulations themselves, rather HMRC's interpretation following the St John's College School, Cambridge v Secretary of State for Social Security case in 2000, and HMRC's guidance. HMRC believes that its interpretation, that the Regulations apply more widely than to academic tuition delivered in a traditional

educational establishment, is correct. However, in the light of the consultation it accepts that vocational training providers are experiencing particular difficulty in understanding and applying HMRC's interpretation of the Regulations."

32. The St John's College case³ referred to in the consultation document attempted to address the issue of whether visiting instrumental teachers were engaged under contracts of service or contracts for service. The key point coming out of this case was that it provided some guidance on the meaning of "educational establishment" in relation to Regulation 1(2) of the Categorisation of Earners Regulations but also led to concerns from some vocational trainers as to how HMRC was interpreting the Regulations.
33. HMRC acknowledged that:

"There has been criticism of the extent to which HMRC's guidance is clear regarding HMRC's interpretation of the Regulations. HMRC accepts that some of its guidance has been unclear. Discussions with vocational trainers to identify shortcomings in the guidance has identified the difficulties vocational training providers experience in applying the Regulations to only certain vocational training based on the precise nature of the tuition delivered."
34. Although the decision to revoke the provisions of the Regulations applying to vocational trainers had been made at the time of the request, the Commissioner recognises there is a strong public interest in the provision of the legal advice to demonstrate how HMRC interpreted the Regulations and reached the decision to revoke the Regulations. Disclosing the legal advice will provide further transparency and allow those people affected by the Regulations the opportunity to examine the legal advice that guided HMRC's thinking.
35. The complainant has argued that it is important for the public to know what legal advice HMRC obtained regarding the Regulations and whether that advice was followed. The Commissioner recognises the public interest in ensuring that public authorities do not ignore any legal advice they obtain or proceed with an action which is potentially detrimental to the public. In this case the legal advice requested relates to decisions made following the St Johns case. The advice covers the decisions and legal basis for HMRC's decision to revoke the Regulations in light of the St John's decision.

³ <http://www.hmrc.gov.uk/manuals/esmmanual/esm7230.htm>

36. Having viewed the withheld information the Commissioner is of the view that it is unlikely the legal advice within the scope of this request would uncover any perceived wrongdoing or what the complainant believes to have been deliberate ignorance of previous advice. This is because the advice in this case was triggered by the need for HMRC to review its position on the interpretation of the Regulations as a result of a particular and specific case. It does not therefore represent a spontaneous change in position which may be indicative of a disregard of previous advice. For this reason the Commissioner does not apportion significant weight to this argument in favour of disclosure.
37. The Commissioner considers there is some merit to HMRC's argument that disclosure may impact on its ability to defend its legal interest and gives this argument some weight. He also recognises there could be costs to the taxpayer if HMRC is required to defend legal challenges. That being said, the Commissioner does not consider this cost to be a reason on its own for the information to be withheld as there may be legitimate legal challenges that result which could be in the public interest.
38. The Commissioner accepts there is a very strong public interest in HMRC being able to obtain full and thorough legal advice to enable it to make legally sound, well thought out and balanced decisions without fear that this legal advice may be disclosed into the public domain. The Commissioner considers that disclosure may have a negative impact upon the frankness of legal advice provided and may even have an impact upon the extent to which legal advice is sought. This in turn may have a negative impact upon the quality of decisions made by HMRC which would not be in the public interest. However the Commissioner does not accept that disclosure would lead to HMRC or its legal advisers failing to record legal advice thoroughly in the future.
39. The Commissioner has considered how wide-ranging the effects of the Regulations were and how many people are likely to have been affected by the revoke of the specific provisions of the Regulations in this case. He notes HMRC's estimate in its second consultation document that the number of people likely to be affected was less than first anticipated but that the overall number of people carrying out all types of "training-related" activities and completing Self Assessment records was 60,000.
40. As well as this the Commissioner is aware that some first aid associations were also involved in campaigning to have the provisions of the Regulations relating to training providers revoked due to HMRC's alleged misinterpretation of the Regulations. The Commissioner considers this to be a valid argument for disclosure as, although the Regulations have been revoked for teachers, lecturers and trainers; the withheld information in this case provides background to HMRC's

decisions and interpretation prior to the revoke and would increase accountability and transparency in HMRC's decision-making and processes.

41. However balanced against this the Commissioner also acknowledges that the number of people likely to still be entitled to making applications for refunds who would be interested in understanding the decision-making process leading to the revoke of the Regulations is likely to be much smaller than the 60,000 carrying out all training related activities and completing Self-Assessment records. As the Regulations have now been revoked for teachers, trainers and lecturers the number of individuals and groups still likely to be affected will be relatively small.
42. The Commissioner has considered the withheld information and the wider context that informs the public interest against the principles of transparency and accountability. For the reasons set out above and whilst this is a finely balanced case, the Commissioner considers that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
43. The Commissioner has made this decision after considering the strength of the arguments around maintaining the principle of legal professional privilege and the fact that the advice is still live. In addition to this, although there are strong arguments in favour of disclosing information to aid transparency and to help assist the understanding of decisions being made by public authorities, as a relatively small number of people are now affected by the Regulations the Commissioner considers that these arguments are outweighed by the arguments in favour of maintaining the exemption

Right of appeal

44. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

45. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
46. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Lisa Adshead
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF